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Motions

1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

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3 AMERICAN BROADCASTING
4 COMPANIES, INC., et al.,

Plaintiffs,

v.

12 Civ. 1540 AJN

6 AEREO, INC.,

7 Defendant.

8 -----x

12 March 13, 2012
13 3:43 p.m.

16 Before:

17 HON. ALISON J. NATHAN,

18 District Judge

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1 (In open court)

2 (Case called)

3 THE COURT: Please be seated.

4 As you say, there is a parallel matter with a motion
5 to consolidate pending in front of Judge Marrero. He has not
6 acted on that yet. I have attempted to contact him today and
7 was unable to reach him. He has got some family matters to
8 attend to, but I will see what he wants to do with that.

9 I don't know how that impacts what we need to do
10 today, which I gather is to set a schedule, but why don't I
11 hear from you, Mr. Keller. To tell you what I have before me,
12 I reviewed the complaint, and then I have a letter from -- am I
13 saying it right, AEREO?

14 And then I have an answer as of today which I have
15 briefly seen and a letter indicating AEREO's views as to an
16 appropriate schedule, seeking to move to final disposition.
17 But, Mr. Keller, I don't believe I have your views on specific
18 process going forward. So why don't you start situating me any
19 way that you like and then turning to the process.

20 MR. KELLER: Maybe because you raised the scheduling
21 issue first, I'll address that although if I can get a couple
22 of seconds to talk to you about our view of the matters, I
23 would like to do that, too, not too much because we are early
24 in the case. We need a preliminary injunction. Our position
25 is there is irreparable harm that will ensue as of tomorrow

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Motions

1 when AEREO publicly launches its service, which as I think you
2 know, will capture over-the-air television signals as they are
3 broadcast, process them and then transmit them or retransmit
4 those broadcasts over the internet to AEREO subscribers.

5 THE COURT: Just to be clear, you face irreparable
6 harm tomorrow, but you have not filed a motion for preliminary
7 injunction?

8 MR. KELLER: We have yet to file a motion for
9 preliminary injunction. The only reason you don't have that in
10 front of you, I picked up the phone and contacted Chambers to
11 see what the court would like to do by way of a schedule. I
12 read your rules. I know know how you like to hold preliminary
13 injunction hearings.

14 Rather than unilaterally move for something, I thought
15 it would be good to contact Chambers, come down and talk to you
16 about what we think a sensible schedule is, taking into account
17 the court's own schedule. We are prepared to move, but we
18 think -- and I don't think there is any disagreement on this
19 piece of what --

20 THE COURT: Just so we have clarity on the record,
21 when did you contact Chambers?

22 MR. KELLER: We called Chambers last Friday, your
23 Honor.

24 THE COURT: Last Friday, which was March 9th you
25 contacted Chambers? So five days before irreparable harm?

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Motions

1 MR. KELLER: Five days before the launch for sure and
2 upon the launch, we think we are really going to be facing
3 irreparable harm that would be a prerequisite to you issuing
4 the relief we seek. The reason we don't think anything of
5 significance has happened before then is all the cases that say
6 if a defendant or potential defendant says they're test
7 marketing something, things aren't really imminent.

8 When they publicly announced this defendant announced
9 it was going to actually launch its service, that's when things
10 really become imminent. They announced they were going to
11 publicly launch in the middle of February, and our complaint
12 was on file I think 10 to 12 days thereafter.

13 It was a week after that that we contacted Chambers to
14 say let's talk about this so we can proceed in the most
15 expeditious manner. We think we have actually accomplished
16 quite a bit because I don't think, as I was about to say, that
17 there is any disagreement that some evidentiary record will be
18 useful to you in coming up with your ruling on our preliminary
19 injunction motion.

20 We think this is the type of case where facts matter,
21 and there may be disputes about facts. There may not be
22 disputes about facts. We don't know because we still don't
23 know how it is that AEREO actually processes the television
24 signals that it takes and streams across the internet. It
25 could do so in a variety of ways.

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Motions

1 They have been opaque about that until now. We think
2 that a limited evidentiary record and expedited discovery on
3 that so we can lay it out before you is the way to go. It will
4 be the most useful, and I think everybody one agrees with that.

5 I received a copy of the letter that you received
6 yesterday, and I understand their position to be we don't
7 oppose expedited discovery as long as it is in connection with
8 an expedited summary judgment hearing. They may have a grounds
9 for moving for summary judgment, your Honor. I don't know.
10 There may be disputed facts. There may not be.

11 I do know this: We're not willing to wait four months
12 for a hearing that the court will first undertake to think
13 about whether summary judgment should issue. We do suffer
14 irreparable harm from what we claim to be a very obvious case
15 of copyright infringement. It flows as a matter of course.

16 It is not the first time in this courthouse that a
17 television internet streaming service has been found to cause
18 irreparable harm by the virtue of the fact they're
19 retransmitting without permission the signals.

20 THE COURT: What case?

21 MR. KELLER: Judge Buchwald's two cases. The IVI
22 case, and I can provide you with a copy before we leave, and
23 there is also the Film On case which issued a temporary
24 restraining order.

25 In that case, to be fair, the legal defense was a

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Motions

1 little different. In that case, the defendant said they
2 qualify for one of the secondary transmissions, safe harbors,
3 if you will, the compulsory licenses, of which there are
4 several in the Copyright Act. There are limited circumstances
5 under which a cable television company, for example, your
6 Honor, can take signals out of the air, process them and stream
7 them across cables to their subscribers, but that is a very
8 narrow, heavily regulated statutory scheme and it is examined
9 in great detail by Judge Buchwald. AEREO is not relying on
10 that for good reason.

11 That defendant was enjoined preliminarily after a
12 short period of expedited discovery. In this case, as you know
13 from the answer and the counterclaim, and you know from the
14 letter that they submitted, they're relying on the Cablevision
15 case decided by the Second Circuit. They have not told you
16 everything about the Cablevision case, your Honor. Cablevision
17 does not cover what it is that they're doing and, in fact, the
18 very argument that they are making as to why Cablevision helps
19 them was rejected by Justice Kagan, then Solicitor General
20 Kagan when she filed a brief in the Cablevision case when it
21 was wending its way up for cert. in the Supreme Court.

22 She said it is a wrong interpretation of the Copyright
23 Act to say that mini-antennas, which they say result in a
24 one-to-one transmission, the mini-antenna, there is the
25 subscriber, they link the two. That does not take that out of

C3DJABCM

Motions

1 the realm of a classic public performance and that is why we
2 think Cablevision does not excuse their conduct and why we'll
3 prevail on the merits.

4 It is early in the case and obviously because I am in
5 it a little longer than you, I could go on and on. That is not
6 quite fair. If I leave you for two thoughts today, it is to
7 read a particular section of the Cablevision opinion, which I
8 have a copy of, too, and --

9 THE COURT: I have it.

10 MR. KELLER: You'll know that on Page 134 in the
11 Reporter of that decision, the court goes out of its way to
12 distinguish between public performance analysis and a
13 reproduction right analysis, and the preliminary injunction
14 that we seek will be based on a violation of the public
15 performance right.

16 Cablevision was very cable in the court's opinion,
17 they said they're not the same, and the fact that, for the
18 purposes of that reproduction right analysis which we are not
19 moving on, the fact that a subscriber or an end user is found
20 to make the copy does not answer the question of whether
21 Cablevision and not the subscriber might be involved in the act
22 of public performance.

23 THE COURT: For the purposes of that, which I
24 understand to be somewhat narrow, what discovery do you need?

25 If I understand what you've just said, the preliminary

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Motions

1 injunction you intend to move on is for a violation of public
2 performance right, direct infringement?

3 MR. KELLER: Correct.

4 THE COURT: No secondary infringement?

5 MR. KELLER: No.

6 THE COURT: What discovery do you need and what
7 time-frame would you need for --

8 MR. KELLER: As to time-frame, I notice in the letter
9 you got yesterday they said they're prepared to give us
10 discovery very rapidly. Depending on how they define "very
11 rapidly," and what they intend to give up easily, I would think
12 we need a period of four weeks or so, maybe four to six, no
13 more than that, to get all the information we need to have it
14 vetted by the people that we might retain as experts so we can
15 understand exactly how this thing ticks.

16 Once we know that, because --

17 THE COURT: You need that for the limited PI that you
18 intend to move on for the violation of public performance
19 right?

20 MR. KELLER: Yes, your Honor.

21 THE COURT: And four to six weeks for discovery, and
22 then what are you thinking in terms of briefing and hearing?

23 MR. KELLER: I work backwards. It may be faster than
24 four to six weeks and we should know if it were. We would like
25 to have a preliminary injunction hearing before you no later

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Motions

1 than the week of May 14th. We would like to do it sooner than
2 that if you could accommodate us and we get what we need in
3 discovery.

4 THE COURT: Well, if I can accommodate it, working
5 backwards, if that is what I can accommodate, then that's the
6 time that there will be for discovery. If that is a workable
7 time for a PI, then the time in advance of that will have to be
8 make-work for discovery and briefing.

9 MR. KELLER: If we have a hearing the week of the
10 14th, that leaves us basically eight weeks from where we are
11 now. If we have all of our, papers depending on the schedule
12 that you set, in before you and the witness list and anything
13 else you might require, the written testimony on direct comes
14 in through declarations, if we have that all in the week before
15 that --

16 THE COURT: That is eight weeks.

17 MR. KELLER: The hearing, the actual hearing will be
18 the 8th week from now, that is what I am saying. If I am
19 unclear about that, I apologize.

20 THE COURT: No, I thought that I had a moment of
21 thinking you're in vigorous agreement. I'll hear from your
22 opposing counsel.

23 MR. KELLER: Their schedule, they said 10 weeks for
24 expedited discovery, but then briefing and then a hearing on
25 the summary judgment, that is how they get to their generally

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Motions

1 stated four months. We cannot wait that.

2 THE COURT: You want two months?

3 MR. KELLER: We want to have a hearing no later than
4 eight weeks from now and we'd like to do it sooner. If we can
5 get to you sooner, we are bound and determined to do that.

6 THE COURT: Just to map it out, what you'd like, Mr.
7 Keller, is four to six weeks of discovery?

8 MR. KELLER: At the out outside.

9 THE COURT: At the outside with a hearing, and how
10 much time, how much calendar time do you anticipate for a
11 hearing?

12 MR. KELLER: You know, this is not -- given the way
13 that you take preliminary injunctions through written direct,
14 your Honor --

15 THE COURT: Well, I'm open here. I'd like to hear
16 from both sides on this. It may be the more efficient thing
17 for making me smart on what I need to know here to do live
18 direct.

19 MR. KELLER: Even so, I was going to say I can't
20 imagine this more than two days, I really don't think that.

21 THE COURT: Two days if I do live direct?

22 MR. KELLER: I think two days with live testimony and
23 cross. I still think it is a two-day hearing at most, your
24 Honor.

25 THE COURT: And then what happens following the PI?

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Motions

1 MR. KELLER: Here is where we are in disagreement.
2 The suggestion has been made that somehow we're making more
3 work for the court because then there is a summary judgment
4 record that has to be prepared and you're doing it twice. That
5 is not the way the rules work. Rule 56 and Rule 65 are not
6 mutually exclusive and it is often the case that a preliminary
7 injunction record, in fact, is virtually all of the summary
8 judgment record.

9 We are not taking the position on whether they're
10 going to have an undisputed record that allows for summary
11 judgment or not. We don't know that yet. We haven't had the
12 discovery. Maybe they're right and there isn't much, but I'm
13 not sure about that.

14 What we do know is that the fact that a defendant
15 wants summary judgment pretty quickly is not a defense or
16 reason not to grant an early preliminary injunction hearing.
17 We have a right to seek such a hearing. We have made the case
18 that, based on cases from this courthouse, irreparable harm
19 flows if, in fact, they are infringing not as a matter of
20 presumption, as a matter of fact that we can prove, that is
21 what Judge Buchwald ruled in her IVI, case and we are prepared
22 to build that record in the next six to eight weeks.

23 They would like, obviously, to drag it out. I don't
24 mean that pejoratively; I mean that factually. They're
25 thinking about four months out. We can't wait that long.

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Motions

1 By the way, your Honor, the proposal that they made to
2 you --

3 THE COURT: Can you just flesh out a little bit for me
4 why you can't?

5 MR. KELLER: Because irreparable harm happens every
6 day our rights are infringed, and they're going live, as we
7 understand it, in the New York market tomorrow, and according
8 to the press reports -- and we'll get discovery on this to find
9 out if it is so -- New York is still itself just a test market.
10 They plan to go nationally very quickly according to Mr.
11 Diller, one of their investors, 75 to 100 markets, and we are
12 not clear on the time-frame. We want to know about that, too.

13 New York is still a test market. We are not waiting
14 any longer. They think they can go live. They say that
15 they've been out there doing this for some time. Your Honor,
16 it is what is known as a beta test. It is an experimental
17 group. This is even more narrow. It was an invitation-only
18 beta test. It wasn't widely available according to what they
19 said about their own service. You had to be invited in some
20 way to be part of the beta group.

21 It was the most preliminary of experiments. Now they
22 think they can go live. We're here today to say you can't do
23 it without causing us irreparable injury, and we want to enjoin
24 it early, as early as we possibly can.

25 The summary judgment procedure that they've outlined

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Motions

1 they've cited, that is what happened to Cablevision. They're
2 exactly right, that is what happened to Cablevision. What they
3 didn't tell you in their letter is that Cablevision agreed not
4 to launch its service while the courts had a chance to vet it
5 for whether it was copyright infringement or not.

6 The whole process that they've said is eminently
7 reasonable might be eminently reasonable if they didn't launch
8 tomorrow. But we have asked them would you not launch? That
9 is the first thing we asked. Then we can come up with an
10 agreed-upon schedule like Cablevision. They said we are not
11 waiting, we are ready to go. That is why we need preliminary
12 injunctive relief and we need it now.

13 THE COURT: Thank you, Mr. Keller. Let me hear from
14 Mr. Hosp.

15 MR. HOSP: Yes, your Honor, this is Mr. Englander.

16 MR. ENGLANDER: I am going to speak, your Honor, but
17 Mr. Hosp may need to straighten me out from time to time.

18 As we indicated in our letter, your Honor, we're
19 interested in resolving this as expeditiously and efficiently
20 as we can. We are a small start-up. We have been accused of
21 copyright infringement in connection with what we do. We need
22 to have that resolved.

23 We think the preliminary injunction process being
24 proposed to you will actually delay things and get in the way
25 of that and that is why we have indicated an objection. It is

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Motions

1 possible we can work something out so that that is not the
2 case.

3 THE COURT: Is it right that there is no possibility
4 of an agreed-upon delay of launch to work out a schedule?

5 MR. ENGLANDER: That's correct, your Honor.

6 THE COURT: Okay.

7 THE COURT: I thought maybe if I asked, it would be
8 different.

9 MR. ENGLANDER: No, your Honor. Maybe I should
10 address this first.

11 THE COURT: Go right ahead.

12 MR. ENGLANDER: There are a number, as Mr. Keller
13 said. Maybe I should address this first. They have delayed
14 the opportunity to get this resolved on a reasonable schedule
15 for at least nine months, your Honor. There is no reason that
16 they could not have come to court and sought a declaratory
17 judgment. We did everything but give blueprints, okay?

18 That is perhaps an exaggeration, but we have been very
19 transparent.

20 THE COURT: I haven't looked at the IVI case, but can
21 you respond to the point?

22 MR. ENGLANDER: It is a very, very different system
23 and set of ideas and concepts. What we are doing is providing
24 a system that a consumer can use to do nothing different than a
25 consumer has every right to do right now. A consumer right now

C3DJABCM

Motions

1 can get over-the-air broadcasting by having an antenna on the
2 roof of their home. They can make a copy of that, unique copy
3 for their own personal use and they can play it back to
4 themselves.

5 All we are doing is remotely locating an antenna.
6 They're very small antennas.

7 THE COURT: The size of a dime?

8 MR. ENGLANDER: Exactly. This is one of them and
9 there will be thousands of them. The consumer will tune in to
10 their own antenna. In other words, they will sit at home, go
11 onto our system using our system, and think of it as a machine
12 using our system, tune their antenna, make a copy, their own
13 unique copy of that television program and then play that back,
14 that unique copy that is theirs back to themselves.

15 Your Honor, two cases conclude that that is entirely
16 lawful. One is the Cablevision decision from the Second
17 Circuit, four years' old, that dealt with the remote storage
18 DVR being offered by Cablevision, and I think other is Sony.
19 Sony came from the U.S. Supreme Court which says that a
20 consumer has the right to get over-the-air broadcasts, make a
21 copy for their own personal use and play it back to themselves.

22 So that is what we have here. We have told the
23 industry, and had specific meetings with many of Mr. Keller's
24 clients in which over the last several months we have explained
25 what we're doing. If they needed relief and they were really

C3DJABCM

Motions

1 concerned about it on a preliminary basis, they could have
2 sought a declaratory judgment at any time. They did not. They
3 waited until just before the launch, and now they tell you it
4 is very urgent they get decided.

5 THE COURT: Isn't that an argument you could
6 potentially make counter to their irreparable harm arguments?
7 Why would that preclude them from bringing a preliminary
8 injunction motion?

9 MR. ENGLANDER: The answer is it doesn't. The concern
10 we have is simply somehow they seem to be suggesting to you
11 that they're going to divide up discovery so that what we'll
12 have is one process where they seek a preliminary injunction
13 and then the case will still be out there not resolved and
14 hanging over the head of this start-up company.

15 If we can manufacture a schedule so that we can also
16 have in front of you the summary judgment motions that we
17 believe are appropriate on a record that they do not claim is
18 incomplete -- the thing we don't want to have happen is we go
19 through a process where they move for preliminary injunction,
20 we move for summary judgment, and they say 56 (e), we are not
21 ready yet to decide this.

22 They haven't given us all the facts. We are going to
23 do discovery, get the complete discovery done that needs to be
24 done so your Honor has in front of you the full facts. We
25 think this case is a case, primarily a case that gets decided

C3DJABCM

Motions

1 on the law. We have to know how our system works. That is
2 important.

3 There may be some other facts we need to do discovery
4 of from them, but we can do that rapidly and then have before
5 your Honor all you need to decide a motion for summary
6 judgment, and if they choose to file a motion for preliminary
7 injunction, a motion for preliminary injunction. We need to
8 work on a schedule that allows us to come before you.

9 In the Cablevision case which we were involved in --

10 THE COURT: And you think you can do that, that can be
11 done in, accomplished in four months, a hearing in four months?

12 MR. ENGLANDER: We hashed out a schedule in which it
13 was basically briefing completed in four months. We may be
14 able to do it faster with cooperation from the parties, I
15 believe we could. I am listening to Mr. Keller saying he is
16 going to have four to six weeks of discovery and a hearing in
17 eight weeks, and I am wondering where the briefing comes in.
18 We haven't even seen their motion yet.

19 Their schedule, it seems to me, I don't quite get it.
20 Are they saying they're going to file their motion before
21 discovery is complete or are we going to be, after 9 months are
22 they going to give us four days to respond to a preliminary
23 injunction motion?

24 We have, with respect to preliminary injunction
25 motion, we have a serious issue about irreparable harm that

C3DJABCM

Motions

1 needs discovery. What we are talking about here, because this
2 is something the consumers can do now, it is not at all evident
3 what the irreparable harm is. Tomorrow when we provide another
4 system that does what consumers can do anyway, it is not clear
5 what the irreparable harm is to the broadcasters from that.
6 There should be none. So we need discovery on that, and that
7 is part of the reason we thought this process needs to play a
8 little long longer.

9 THE COURT: What would that look like? What amount of
10 time would it take?

11 MR. ENGLANDER: We can do it within the time they're
12 taking discovery on our system, we believe, your Honor
13 simultaneously.

14 THE COURT: Not less?

15 MR. ENGLANDER: Less time than that? I think it is
16 four to six weeks.

17 THE COURT: What would it look like?

18 MR. ENGLANDER: It would look like discovery of the
19 people who, I suppose --

20 THE COURT: Are you talking depositions?

21 MR. ENGLANDER: I think so, yes, your Honor, because
22 interrogatories as to what their contention is, how they claim
23 that they are being irreparably harmed, followed by witnesses
24 with respect to how they claim they're being irreparably
25 harmed, and probably simultaneously documents from them

C3DJABCM

Motions

1 regarding their retransmission agreements that they currently
2 have because we believe they're going to claim that they're
3 losing revenue from -- that they are potentially going to lose
4 revenue from the retransmission agreements they have. We are
5 going to need the retransmission agreements and we are going to
6 need to take discovery about those.

7 THE COURT: Okay.

8 MR. HOSP: I had one or two quick things to add.

9 One of it was on the urgency that is being argued
10 here. The reality is there were a series of announcements,
11 public announcements about this company that started close to a
12 year ago. Mr. Canuge went out to the FCC, had numerous
13 conversations with executives, with many plaintiffs before you
14 were explaining the technology.

15 It was known that this was, the planned launch was for
16 the first -- at some point early on in this year. The claim
17 that somehow the world changed as of February 14th when the
18 announcement was made that the roll-out would begin on March
19 14th -- and let me just be clear about that. The roll-out that
20 begins tomorrow is not a black or white kind of a thing. It is
21 not as though tomorrow hundreds and thousands of people can
22 sign up. There is a process to this. There is a continuation
23 of a roll-out that has already begun. There is no question the
24 announcement talked about the roll-out because that is the way
25 you do these things, roll things out, you have public

C3DJABCM

Motions

1 announcements. It is continuation of a process that began
2 quite a while ago, and there was no material information that
3 was disclosed on February 14th that the plaintiffs didn't have
4 prior to that.

5 I also point out that the announcement was made on
6 February 14th. The complaint wasn't filed until I believe the
7 1st. So, yes, March 1st, so a little over two weeks, they
8 waited two weeks to file it. Then they waited another eight
9 days to contact Chambers. So they have a already built in
10 another month. And the notion that somehow we are talking some
11 of the largest companies in America who had prior knowledge of
12 this, who are building in this time -- in fact, the notion that
13 somehow it's the defendants who are trying to cause delay here
14 is not the case. The reality is it is the defendants who are
15 looking to get this resolved quickly.

16 One question I am not clear on is what discovery is
17 done in the preliminary injunction phase that isn't done in the
18 phase regarding summary judgment or disposition on the merits.
19 I am not entirely clear what it is that can be cordoned off.
20 The reality is they're going to ask for documents regarding our
21 system. That is the majority of our documents. The reality is
22 if we are talking about preliminary injunction, particularly
23 preliminary injunction, we are going to be digging very deeply
24 into the documents they have on irreparable harm. The delay
25 came prior to the filing of the action.

C3DJABCM

Motions

1 It is not clear to me on either side whether it is on
2 the plaintiff's side or the defendant's side, what the
3 difference is behind the discovery. It is not clear to me.

4 THE COURT: Let me hear from Mr. Keller on that. I
5 thought I heard you say something like we can just take what we
6 do for --

7 MR. KELLER: That is exactly what I said.

8 THE COURT: -- without additional discovery?

9 MR. KELLER: That is exactly what I said. This notion
10 there is a duality here in discovery is not one of my making.
11 I said the opposite.

12 THE COURT: Tell me again, I want to focus for a
13 minute on why we can just do this. There is a time question.
14 Let's just for a second bracket the time question.

15 MR. KELLER: Put that aside. Here is my answer.

16 They're entitled to move for summary judgment at any
17 time. That is what Rule 56 says. They can move for it
18 tomorrow. They can move for it at the close of expedited
19 discovery.

20 THE COURT: I suppose you have to answer first.

21 MR. KELLER: Actually, at any time.

22 THE COURT: They can move --

23 MR. KELLER: At any time, that is what the rule says.
24 They put in their answer and counterclaim. If they think we
25 have --

C3DJABCM

Motions

1 THE COURT: I understand you say they need some
2 discovery?

3 MR. KELLER: Not trying to cut it off. I want them to
4 take that discovery. We are going to have some issues,
5 however, for the same reason that Judge Buchwald denied the
6 type of discovery that they now say they want, the very type of
7 discovery they want. The details of those agreements were not
8 important to irreparable harm. There was motion practice
9 before Judge Buchwald. She says you're not entitled to that
10 stuff and I'm not going to give it to you.

11 She turned to the plaintiffs in IVI and said, of
12 course, if you can't prove your irreparable harm harm case
13 because there wasn't adequate discovery, don't come crying to
14 me. We'll take that ruling. We are fine with that. There is
15 no duality, no extra work. They can make their motion at any
16 time. It is always the case, always is an overstatement,
17 preliminary injunction records and summary judgment records are
18 very similar.

19 THE COURT: It is true it is often the case that PI
20 and preliminary in injunction get consolidated.

21 MR. KELLER: You have that right under Rule 65 if you
22 want to convert this to a trial on the merits, Judge, if you
23 give the parties notice, you have the right to do that. Nobody
24 here is urging you to do that, but you certainly could do that,
25 and it is for that very reason courts have the right to do that

C3DJABCM

Motions

1 on notice because the records don't always differ that much.

2 We're not opposed to that. What we are opposed to is
3 this notion of four weeks out. I need to respond to two other
4 things.

5 THE COURT: Yes. I think one of them will be if it is
6 four to six weeks for discovery, what are you looking at for --

7 MR. KELLER: Our preliminary injunction brief. It is
8 not uncommon in this courthouse at all for expedited discovery
9 to precede the briefing that the court gets as to why each side
10 thinks an injunction should or should not issue.

11 Actually, we thought it was -- that is why we called
12 Chambers. By the way, the notion that we delayed, we would
13 have been before you sooner if Mr. Hosp and I had been able to
14 either reach agreement or agree that we couldn't agree. There
15 was a little back-and-forth that got left out that led to the
16 eight days that followed the final of the claim. It is
17 immaterial. I'll get to the main event.

18 The main event is that we are ready to take the
19 expedited discovery. I'll get on the phone with Mr. Hosp later
20 or tomorrow morning and tell them what we need. They can tell
21 us what they need. If there is no disagreement, we'll go to
22 it. The notion, though, that somehow they can't respond
23 because they haven't seen a brief yet is really the opposite.
24 We came down here and said let's talk about this.

25 THE COURT: I missed that point.

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Motions

1 MR. KELLER: There was suggestion somehow the brief
2 has to come in before we move for preliminary injunctive
3 relief.

4 THE COURT: I hadn't understood that. I thought the
5 point was if it takes on the outside six weeks to do the
6 discovery, and then there is a hearing two weeks later, are you
7 talking about doing your motion and their opposition and their
8 reply within those two weeks?

9 MR. KELLER: Yes.

10 THE COURT: Presumably with a little bit of time for
11 me to read the papers?

12 MR. KELLER: Absolutely. The schedule, eight weeks
13 out at the outside, but discovery can be shorter than the four
14 to six weeks. That will allow the parties to fully -- look,
15 Judge, in all honesty, they're ready. They made an appearance
16 a half a day after we filed the complaint. They already put in
17 their answer and counterclaim. They have already written to
18 you on the subject. They have been ready for a long time.

19 We haven't been ready because I have to tell you
20 discovery will show there were no blueprints suggested, there
21 was no transparency. There was discussion about we're going to
22 test market this service. You know what, we are going to
23 retransmit your signals and we think we can do it under
24 Cablevision. That is all we knew.

25 We knew one more thing. Their antennas are really,

C3DJABCM

Motions

1 really small. That doesn't change anything. It is what goes
2 on behind the scene that makes the difference. That is why we
3 need expedited discovery. Once we get that discovery, we will
4 be ready to brief it, and you'll have ample time to read our
5 moving brief, their opposition, and any reply that we choose to
6 put in. We may not need one. We may talk to you about it when
7 we come see you.

8 The one thing I want to impress upon you in addition
9 to the Cablevision case, obviously, and --

10 THE COURT: Before you turn to that, is there any
11 front briefing you can do before?

12 MR. KELLER: Yes.

13 THE COURT: Just to see in your interpretation, but
14 could you do a --

15 MR. KELLER: Absolutely.

16 THE COURT: So everybody knows what target here is?

17 MR. KELLER: We are happy to do it.

18 THE COURT: What would that look like?

19 MR. KELLER: It would be devoid of facts, but it would
20 be a primer on the law to the extent that either side thinks
21 that Cablevision is important for you to really dissect, each
22 side can dissect it, we are all for that. We can have a brief
23 in next week.

24 Theirs is probably halfway written, Judge. They have
25 had on their web site their legal theory available for

C3DJABCM

Motions

1 everybody to see. What we haven't had are the facts and, of
2 course, we haven't had the imminence of a launch.

3 There is not a single case that suggests that you have
4 to sue for a preliminary injunction on the basis of a test
5 market. You can look for it. They go the other way. You
6 don't have to. That delay argument, as you said, goes to the
7 merits whether or not a preliminary injunction should issue.
8 It is not a reason not to schedule it.

9 The thing that I think is most telling of what you
10 just heard, Mr. Englander must have used the word "copies" half
11 a dozen or more times. We are not focused on the copy except
12 insofar as a copy assists the public performance.

13 We are not talking about time-shifting. We go home,
14 and you want to record a program and you want to watch it the
15 next day? That is time-shifting. The Supreme Court has
16 spoken. You, in the privacy of your own home, can do that.
17 That is not what we are talking about in terms of preliminary
18 injunction motion.

19 We are talking about the same transmission of
20 television signals in real time enjoined in IVI case, I Crave
21 TV case in 2000 in the Western District of Pennsylvania. This
22 is not the first time somebody tried to use the internet as a
23 retransmission medium. Every time they tried to do it with
24 copyright and television programs, they have been enjoined.

25 The same results should obtain here. We can start

C3DJABCM

Motions

1 briefing you why next week, but we need to get that hearing on
2 so we can get that preliminary injunction, and we would like to
3 do it, if the court would permit, no later than the week of May
4 14th.

5 THE COURT: I have a couple of questions.

6 I think I need, at some point we need to bring the
7 Jenner folks in a little bit because it is not consolidated,
8 but if it is consolidated, I am wondering now if we are on the
9 same schedule or not. You've presented a very, what I
10 understand as to be a quite narrow claim just on direct
11 infringement, just going to the violation of public performance
12 right.

13 MR. KELLER: That's correct.

14 THE COURT: I don't know if that is where they are and
15 how and if these matters are consolidated, how that affects the
16 the schedule. Let me hear from everyone on that point and then
17 we'll return to the cases actually in front of us.

18 MR. FABRIZIO: Thank your Honor. Steve Fabrizio.

19 We agreed with everything Mr. Keller said in terms of
20 need to quickly get the preliminary injunction and a need to
21 avoid a four month schedule which everybody knows is not
22 ultimately going to be four months for summary judgment.

23 THE COURT: Sorry, everybody knows what?

24 MR. FABRIZIO: It is not ultimately going to be the
25 end date for preliminary injunction. That will be when the

C3DJABCM

Motions

1 briefs go in. Then there will have to be a hearing and
2 decision and there will probably be more argument about what
3 form of injunction should issue. I don't suppose everyone
4 concedes all of those issues after-the-fact.

5 We have every expectation and hope that we will very
6 quickly be before you in this Court and that these two cases
7 should proceed in absolute lockstep on the same schedule
8 without double-teaming AEREO. We are in close coordination, we
9 will coordinate discovery, coordinate hearings. Our
10 expectation is that having the two cases together is not going
11 to add any additional time.

12 THE COURT: Are your claims limited in the same way as
13 Mr. Keller's?

14 MR. FABRIZIO: We have the exact same public
15 performance claim, direct infringement. We also have an
16 alternative unfair competition claim.

17 THE COURT: That is your state claim?

18 MR. FABRIZIO: Yes.

19 THE COURT: Before your state claim under the
20 Copyright Act, I'll take a peek at your complaint.

21 MR. FABRIZIO: Ah --

22 THE COURT: I thought I saw some reference to
23 contributory, secondary liability?

24 MR. FABRIZIO: We would be moving for preliminary
25 injunction on direct infringement of the public performance

C3DJABCM

Motions

1 right and perhaps on the state law claim in the alternative.

2 THE COURT: Okay.

3 MR. FABRIZIO: That is it. We believe the discovery
4 that is needed for both of those is essentially the same when
5 you consider irreparable harm.

6 THE COURT: Go ahead, Mr. England.

7 MR. ENGLANDER: The first point is it is true we can
8 file a motion for summary judgment at any time. As I indicated
9 and I thought --

10 THE COURT: You indicated you need discovery?

11 MR. ENGLANDER: No, we don't need discovery to move
12 for summary judgment.

13 THE COURT: Right. You said you needed discovery on
14 irreparable harm?

15 MR. ENGLANDER: We are ready to move for summary
16 judgment, but what we don't want is a schedule to come before
17 you once on preliminary injunction and we file a motion, and he
18 says 56 (e), I haven't had enough discovery yet.

19 We need a schedule that allows us to present both of
20 them before you. If there is a belief that we can do that in
21 eight weeks, I am very skeptical of that because I certainly
22 don't think in a matter of this magnitude, when we haven't seen
23 their motion for preliminary injunction yet, we should be
24 forced into some extraordinarily rapid response brief.

25 Mr. Keller says we have our briefing ready. That is

C3DJABCM

Motions

1 not true with respect to irreparable harm. We do not know
2 their irreparable harm case. We can certainly brief why it is
3 that we think what we are doing is lawful. We are prepared to
4 do that.

5 We don't have a motion for preliminary injunction or
6 an irreparable harm motion or even, even an outline of what
7 their irreparable harm case supposedly is. I am skeptical of
8 eight weeks. Am I skeptical of 12? Probably not as long as we
9 are going to put both types of motions before you at the same
10 time so that we have the opportunity to resolve the entire
11 matter at the same time.

12 Your Honor may decide no, but we would like that
13 opportunity, and not to go at this piecemeal because what that
14 is, that is a prescription for AEREO not to have this matter
15 resolved and have it continue on.

16 THE COURT: I understand that. Am I hearing you right
17 that it a difference between two months and four months?

18 MR. KELLER: No, I don't think so that is right. Mr.
19 Fabrizio put his finger right on it. Their proposal is quite
20 different as it was articulated in the letter. Maybe it
21 changed a little bit today.

22 It is 10 weeks or it was 10 weeks of discovery, then a
23 briefing schedule, then we submit it your Honor, four months
24 out we start briefing it, moving brief, opposition brief, reply
25 brief. Then you get to decide it. Of course, I know the court

C3DJABCM

Motions

1 will do as fast as it can, but there is a difference between
2 deciding summary judgment and having to rule quickly on a
3 preliminary injunction record.

4 Then as he said, there will be some disagreement if we
5 are to prevail over the scope of an injunction, and all of that
6 means what they really want is something a few more months out,
7 and we can't wait and it is not a defense. It is not the basis
8 for opposing preliminary injunction to say I want summary
9 judgment, and I am not representing, your Honor, one way or the
10 other whether there will be additional discovery necessary.
11 Right now I am hard-pressed to think about what it will be. In
12 large part whether additional discovery is going to be needed
13 will depend on how candid they are about what the facts really
14 are.

15 We are going to face exactly the same issue, though,
16 when we're in expedited discovery to build a preliminary
17 injunction record. The more cooperation, the less need for
18 discovery further down the road. This is not an attempt to get
19 two bites at the apple. It is an attempt to do what we are
20 entitled to do, which is ask the court for preliminary
21 injunctive relief on an expedited schedule.

22 It was an excellent suggestion you made. We are happy
23 to submit to the court, even bereft of detailed facts, why
24 Cablevision cuts against them in several significant ways. We
25 have Solicitor Kagan's brief on that, we can work it into our

C3DJABCM

Motions

1 brief and point out why. We have got the IVI case. We have
2 the I Crave TV case. We have two or three other cases where
3 efforts to use the internet to transmit copyrighted program was
4 held to violate the public performance right.

5 We can brief all of those cases for you and we can do
6 that next week. I bet you Mr. Fabrizio can do it, too, so we
7 can get going. Then there won't be any surprises. To the
8 extent you have the brief and you think about it and have more
9 questions, you can ask us for more briefing. In the meantime,
10 there is no slight of hand here. They will know what our
11 theory is. They do. They anticipated it. It has been on
12 their web site for a while what their theory is. They know
13 what we are going to say.

14 What is interesting, I have to come back to it, every
15 time you heard from Mr. Englander on the merits, he kept
16 talking about copies. Copies goes to the reproduction right.
17 We are interested in the preliminary injunction as a violation
18 of the public performance right, and Cablevision, at Page 134,
19 says they're not the same for any number of purposes, most
20 importantly who's doing the act.

21 This is a little little like the Wizard of Oz, where
22 Toto pulls back the curtain and there is a wizard pulling the
23 levers and buttons and switches, and the Great Oz being
24 projected up on the screen says pay no attention to the man
25 behind the curtain who is really doing the projection.

C3DJABCM

Motions

1 AEREO is doing the same thing. Pay no attention to
2 the fact we set up an entire system to grab broadcast signals
3 over the air. They use a fiction of a mini-antenna and say
4 that you know what, we fit within Cablevision. They process
5 our copyrighted programming and they stream it across the
6 internet, and Mr. Englander is wrong when he says consumers can
7 do it now. They can't do it now. If they could do it now,
8 stream signals across the internet, you wouldn't need an
9 aerial. They can't do it now.

10 When he says they can do it now, he is talking about
11 time-shifting. We are not litigating time-shifting. The
12 Supreme Court has spoken. The public performance right, every
13 time it has been litigated in this courthouse and elsewhere,
14 whatever the defense, the cases were the same, they take the TV
15 signal, copyrighted programming, stream it to subscribers or
16 users on the internet. Every single case says that is a
17 violation of the public performance right. Cablevision does
18 not speak to the contrary. We are ready to brief that for you
19 next week.

20 MR. ENGLANDER: First of all, we did suggest four
21 months to have briefing complete and be ready to go.

22 THE COURT: Four months to the hearing?

23 MR. ENGLANDER: Yes, four months to be ready to decide
24 it on the merits. We really are, and I don't think -- as I
25 listened to Mr. Keller, he doesn't have specifics as to how we

C3DJABCM

Motions

1 are going to get from six weeks of discovery to a properly
2 briefed hearing before you in eight weeks. I don't see it. I
3 think we really are, as you pointed out, sort of debating the
4 difference between two and four months.

5 The second point, the public performance right,
6 Cablevision directly addresses the public performance right and
7 directly holds in that case there was no public performance
8 because the individual was making their own unique copy, using
9 Cablevision's system and playing back their own unique copy to
10 themselves. That is exactly what AEREO's system allows, and it
11 is true that right now a consumer with the appropriate
12 electronics can do exactly that and they can do it through an
13 internet system to an international monitor.

14 THE COURT: Do you have -- the response is not the
15 right word -- anything you want to say about if the matters are
16 consolidated and how that interfaces with the scheduling in any
17 way in light of what you've heard, Mr. Fabrizio?

18 MR. FABRIZIO: Yes.

19 MR. ENGLANDER: Here is the only thing that their case
20 may add, and it is unclear to me to what degree they're going
21 to pursue it, is an indirect infringement case. Our position,
22 as I believe -- I can tell your Honor has done some looking at
23 this -- our position is that that case is foreclosed by Sony,
24 that Sony holds that an individual has the right, that the
25 consumer is engaged in a fair use when they make a copy of an

C3DJABCM

Motions

1 over-the-air broadcast for themselves and they play it back to
2 themselves.

3 That is not a public performance because it is just
4 coming to them. Cablevision establishes that unequivocally.
5 Therefore, we can move for summary judgment on the indirect
6 infringement case as well and we can put that before you at the
7 same time, and we believe it can be resolved on summary
8 judgment. That is the difference that this case may add.

9 MR. FABRIZIO: I can save counsel some time?

10 THE COURT: Say that again?

11 MR. FABRIZIO: I can save counsel some time.

12 We do not have a claim for the virtual DVR copying
13 that they allowed. The reproduction claim in our complaint is
14 because we do not know the internal workings of how they engage
15 in the public performances and what copies and what is the
16 nature of copies that were made in aid of the public
17 performances.

18 THE COURT: You would need additional discovery beyond
19 the PI discovery for --

20 MR. FABRIZIO: No, your Honor. It is part and parcel
21 of the same discovery. I believe what everybody needs is to
22 know how a signal gets into their system, how it works its way
23 through their system, and how it leaves their system, and
24 that's the discovery that will tell us that. It is no
25 additional discovery. We may very well not move on that. It

C3DJABCM

Motions

1 depends entirely on things we do not know now about how they do
2 what they do in their public performing of these works.

3 To be as clear as can be, we have not moved, we have
4 not filed a complaint raising claims against the virtual DVR
5 portion of their service.

6 MR. KELLER: Your Honor, we keep going back between
7 merits and scheduling. Scheduling is much more important
8 because it is unfair for you to have to listen to lawyers who
9 have been thinking about this for a few weeks at least, and in
10 the case of AEREO much longer, baffle you with all sorts of
11 citations.

12 THE COURT: You're worried about me?

13 MR. KELLER: I am not worried. It is unfair.

14 THE COURT: I am looking forward to the briefing.

15 MR. KELLER: We should give you a better record.

16 THE COURT: I am not going to decide --

17 MR. KELLER: We want the expedited discovery so we can
18 do that. That is the way the case should be teed-up for you so
19 you have everything you need and not just lawyers' argument,
20 which is all you'll get, but we'll give it to you next week.

21 THE COURT: Mr. Englander, you might want to make
22 another point.

23 MR. ENGLANDER: The only thing, that was a very
24 helpful clarification. It sounds like we are not engaged about
25 a debate what Sony did or didn't cover.

C3DJABCM

Motions

1 I agree with Mr. Fabrizio, based on what he is talking
2 about, the discovery can be done as the discovery Mr. Keller
3 would need to do and motions for summary judgment from our
4 perspective can be filed against those claims.

5 So that is is very helpful. We are now just debating,
6 it sounds like we are debating between 8 to 10 to 12 weeks and
7 4 months and what is appropriate to get the appropriate record
8 and the appropriate briefing before you to resolve if they're
9 going to file for preliminary injunction and when we see it, we
10 can do that and do motion for summary judgment from our side.

11 MR. KELLER: If you said six weeks for expedited
12 discovery or less, we would have our moving brief in addition
13 to whatever we give you next week, I stand by that offer the
14 day discovery closes. That is a full two weeks.

15 THE COURT: Plus, plus some preliminary briefing
16 potentially on --

17 MR. KELLER: I am ready to brief something for you
18 next week.

19 THE COURT: That would make, and my thinking is in
20 part starting to get me into the law, but also to just I think
21 of it as just a clear target for the PI for the other side,
22 that they don't have to -- they can quickly know what it is as
23 you have represented.

24 MR. KELLER: We can lay it all out for them next week
25 so they have a roadmap of our moving case. The only thing that

C3DJABCM

Motions

1 will follow will be the facts, the proverbial meat on the
2 bones, and then the day the discovery closes is the day we can
3 submit our pre-hearing brief with the facts that elaborate on
4 our legal theory.

5 If we got done in five weeks of discovery, you would
6 have five weeks and then you would have two to three weeks, our
7 brief comes in the day discovery closes, their brief comes in
8 the next week, our reply brief comes in a few days after that
9 and that's how we do. I don't think it is that hard, from six
10 weeks to eight weeks or five weeks to eight weeks. It is done
11 all the time.

12 This really, the degree to which we are getting pushed
13 back on this I think is proof in the pudding. They want to put
14 this off, but they can't any longer. They're trying to have it
15 all ways. We didn't move fast enough, but now that we have
16 moved, now it is too fast.

17 THE COURT: What I hear is they want to put it off a
18 little bit in order to get everything resolved at once.

19 MR. KELLER: There is nothing extra. That is why I
20 come back to Rule 56. They can move for summary judgment any
21 time. We are not going to stop you.

22 THE COURT: Let me ask, we touched on it, but what
23 would your view be to under 65 (a)(2) to consolidate the PI
24 hearing with the trial on merits? Could we do that?

25 MR. KELLER: I don't know what our client's position

C3DJABCM

Motions

1 is on that because I haven't raised it with him. You have the
2 power to do it, on notice to the parties. I don't know what
3 that does to the case, but I have to tell you it does serve
4 similar purposes as their plan. The one thing I can tell you
5 my clients would say is unacceptable to them, if they were
6 asking what their preference is, they wouldn't want that to add
7 time to the schedule. In other words --

8 THE COURT: Would they if it were a day, two days?

9 MR. KELLER: I settle cases on --

10 THE COURT: You're close?

11 MR. KELLER: One day is not going to make --

12 THE COURT: I am curious if there is way to get to
13 something like a three-month schedule, not to be overly
14 simplistic, but you want to, once they want four months, could
15 we get to three months and do everything?

16 I should take a peek at my calendar to know if it is
17 even in the ballpark.

18 MR. KELLER: The whole point of coming down today,
19 your Honor, was to take your calendar into account. You should
20 do that.

21 THE COURT: That's why we're here, but I am saying I
22 should look. I literally have my calendar here so I want to
23 look because we might be arguing, we will know exactly what
24 we're arguing about. But, Mr. Englander, did --

25 MR. ENGLANDER: One other issue I want to raise, does

C3DJABCM

Motions

1 Mr. Keller anticipate expert affidavits with respect to his
2 preliminary injunction motion?

3 MR. KELLER: Yes.

4 MR. ENGLANDER: So part of why we thought four months
5 was the appropriate time is because we anticipated that experts
6 would be involved, that the experts wouldn't be able to do
7 anything until the discovery of our system was done and that
8 there would be deposition discovery of those experts.

9 Again I'm working off my experience with the
10 Cablevision case where there were limited experts, it was done
11 very cooperatively and efficiently, and in the end there was
12 really no disputed fact.

13 If you read the case of the District Court or the
14 Second Circuit, although there was actual live testimony about
15 how the systems worked, there were no disputed facts. It was
16 useful, I think, to both courts to have that process play out.

17 THE COURT: But it is right that in Cablevision there
18 was an agreement not to proceed until --

19 MR. ENGLANDER: That's correct, your Honor. My point
20 is this -- and again we do not want to delay this -- if it is
21 believed we can do this on a shorter time-frame, we certainly
22 will endeavor to do that.

23 If Mr. Keller is going to drop an expert affidavit for
24 the first time on us a week before a scheduled preliminary
25 injunction hearing or two weeks before it, then we've

C3DJABCM

Motions

1 compressed our time quite a bit.

2 THE COURT: Mr. Keller, when you say four to six
3 weeks, that is fact discovery and that is distinct from expert
4 discovery?

5 MR. KELLER: No, your Honor. We'll do it all.

6 MR. ENGLANDER: That is fine.

7 MR. FABRIZIO: Your Honor, just one quick point.

8 Defendants seem to be under the impression they have
9 an absolute right to present a dispositive summary judgment
10 motion at the same time we present a preliminary injunction.
11 Obviously, preliminary injunctions are preliminary in nature,
12 they are a different standard. They're designed to stop
13 irreparable harm.

14 They argue it is a totally different system. What
15 this Court has already decided, has already ruled on a full
16 factual record that the exact same consumer service causes us
17 irreparable harm. There is no question about that.

18 THE COURT: What is that?

19 MR. FABRIZIO: IVI case. IVI had one big antenna.
20 Beyond that, as far as we can tell, it is the same thing.

21 So whether it is one big antenna or, as they like to
22 say, tons of teeny, tiny, little antennas, we think the legal
23 issue is identical. The reality is the irreparable harm we
24 face, our clients face from a retransmission television service
25 over the internet is identical, and the court has ruled, made

C3DJABCM

Motions

1 factual findings that we are suffering irreparable harm.

2 There is just no right on the part of the defendant to
3 presuppose that a schedule has to work backwards from their
4 preferred summary judgment on a final disposition of the case.
5 The reality is, we will have the preliminary injunction and one
6 side or the other is very likely to immediately appeal that
7 preliminary injunction, and then you will get to final
8 dispositive closure on a preliminary injunction basis. Whether
9 the case goes on after that, your Honor, most experience is
10 cases at that point would end.

11 We shouldn't be held to an expedited final disposition
12 that delays our preliminary injunction. Preliminary
13 injunctions are heard on two, three, four weeks of discovery
14 all the time. That is really all we are asking for.

15 THE COURT: Two, three, four, five, six?

16 MR. FABRIZIO: Two, four, six, your Honor. The point
17 is taken.

18 THE COURT: I suppose another option would be to just
19 do a very compressed PI schedule.

20 MR. HOSP: If I may, two quick points.

21 One is we seem to be hearing the completely separate
22 argument from both sides which is on the one hand, they
23 couldn't have filed a preliminary injunction until now because
24 they didn't know what was behind the curtain.

25 On the other hand, they know exactly what the system

C3DJABCM

Motions

1 is and they know that somehow someone, this Court has ruled
2 against it previously.

3 THE COURT: I am not, as I sit here, moved by the fact
4 they didn't file sooner. As I've said, you can make those
5 arguments in front of me is a question of irreparable harm.

6 MR. HOSP: Fair enough.

7 THE COURT: They can bring a preliminary injunction
8 motion.

9 MR. HOSP: Fair enough. We are not disputing at all
10 their right to bring a preliminary injunction hearing, not in
11 the least. We think that delay should be accounted for in the
12 scheduling of that preliminary injunction hearing.

13 Ultimately we are really are talking about scheduling,
14 and that is really the --

15 THE COURT: We'll have a scheduling hearing.

16 MR. FABRIZIO: We are not done yet.

17 THE COURT: We are getting there.

18 MR. KELLER: What is this record?

19 THE COURT: An hour and a half.

20 MR. HOSP: What we are hoping for is to make sure the
21 discovery needs to be conducted, the discovery plaintiffs
22 intend to take of our client and the discovery we need to take
23 of plaintiffs can all happen in a way that, sure, absolutely.
24 If the parties want to file summary judgment briefs when that
25 is over, that is fine. If they want to file preliminary

C3DJABCM

Motions

1 injunction briefs when that is over, that is fine as well.

2 What we don't want to have happen is basically have a
3 schedule that goes forward with a limited amount of discovery
4 for preliminary injunction and then the process somehow grinds
5 to a halt, we do the preliminary injunction and we don't get
6 discovery if we need it to resolve this on the merits because
7 that is --

8 THE COURT: I would set the schedule for discovery
9 following PI. Based on representations, I can set it and maybe
10 even without I can set a very tight schedule.

11 MR. HOSP: What we are asking for again is the notion
12 that these two processes be rolled into each other in a
13 reasonable way, that is our goal.

14 MR. FABRIZIO: Our point is they simply have no right
15 to insist that they be rolled together.

16 THE COURT: That is true. I thought for a moment we
17 might be verging on some agreement, but now I am less certain.
18 Let me pause talking for a moment and look at my calendar.

19 (Pause)

20 THE COURT: Mr. Keller, you had said your desire would
21 be no later than May -- what was it?

22 MR. KELLER: If possible, your Honor, the week of May
23 14th.

24 THE COURT: Am I seeing this right, Sayra, that I have
25 a trial starting on the 15th? I have a trial the week of the

C3DJABCM

Motions

1 15th, the week of the 14th and the 21st?

2 (Off-the-record discussion)

3 THE COURT: It turns out I have two trials in May. I
4 have a three day Bench trial starting on May 15th, so that week
5 is going to be out. That will go to trial.

6 The following week I have a week-long jury trial
7 starting on the 21st. So we need to either have to move closer
8 in time or further in time. Given your harm, is moving closer
9 in time a possibility?

10 MR. KELLER: I think it is a possibility. Here is my
11 suggestion: In the spirit of cooperation that has
12 characterized the entire proceeding, I think Mr. Hosp and Mr.
13 Englander and Mr. Fabrizio and I ought to get together and see
14 what around that time-frame is doable and pick a date that is
15 either before the two weeks that you have, two weeks you have
16 blocked out or the week thereafter because obviously if those
17 two weeks are blacked out, they're blacked out.

18 I have to say even I, as urgent as this is and
19 irreparable as the harm may be, can't say one week on the side
20 of two weeks or week after makes that much difference as long
21 as everybody understands we are not waiving any irreparable
22 harm arguments in an effort to come up with a schedule that
23 works for everybody.

24 THE COURT: Here is where I am. I would like it if we
25 can do this all at once, but there is not agreement on that.

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Motions

1 In that case, I think you're entitled to a preliminary
2 injunction and to make your arguments and I can accommodate a
3 proceeding, a hearing, I can accommodate it the week of April
4 30th. I can accommodate it the week of May 7th. I appreciate
5 your wanting to work it out, but I think --

6 MR. KELLER: In the spirit of cooperation, why don't
7 we pick the week after, the week of the 28th which then gives
8 everybody another two weeks, gives you more time because if you
9 have trials in those two weeks, you are going to need time to
10 read our submissions. I think that is the fairest thing of
11 all. If we have it the week of the 28th is the week you are
12 available again, right, your Honor?

13 THE COURT: I am available the week of the 28th, but
14 the 28th itself the courthouse is apparently closed.

15 MR. KELLER: Memorial Day, the 28th.

16 THE COURT: I wouldn't mind, but you won't be able to
17 get --

18 MR. KELLER: I wouldn't mind. A hearing that week is
19 the way to go then. That way we can make sure that the briefs
20 come in far enough in advance of your two trials so that you
21 have time with the record that will be created.

22 MR. FABRIZIO: As a current guest in this courtroom, I
23 am hesitant to mention a personal scheduling matter. That
24 would be perfect as long as it -- no, that would be perfect as
25 long as it doesn't slip. For over a year I have been planning

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Motions

1 with my wife to go to the artic, and we leave on June 7th.

2 THE COURT: If it slipped beyond that week, we would
3 be in Mr. Englander's schedule.

4 MR. FABRIZIO: Hopefully they won't take that as an
5 invitation to delay things a little more.

6 MR. KELLER: Your Honor, that is my -- the week of the
7 28th, if we get it done that week, accommodates that concern.
8 That is what we would request that you order expedited
9 discovery between now and then, and the parties can actually,
10 can with this threshold issue resolved, work out a lot of the
11 rest.

12 I will represent now, although I don't know what our
13 position is going to be on summary judgment, I am not looking
14 to do things twice or to make the argument that discovery is
15 incomplete. If it is incomplete or if they think they need
16 something from us that they haven't gotten for their summary
17 judgment motion, I'll represent to the court they can continue
18 on an expedited discovery basis if that makes sense to them
19 thereafter. You can order it anyway, as you said earlier.
20 This isn't an effort to --

21 THE COURT: Do you think there is some possibility,
22 that once you've got, everybody has the date in mind and
23 discovery is full steam ahead, that you wouldn't be opposed to
24 consolidating to trial on the merits?

25 MR. KELLER: Your Honor, that would be the first

C3DJABCM

Motions

1 question I ask the clients when I get back, obviously. You
2 have asked now twice. Let me find out what their position is
3 on that.

4 THE COURT: If it helps, I can ask a third time, you
5 can tell your client.

6 MR. KELLER: It will be in the transcript. We will
7 get it straight.

8 We will certainly take that under advisement and I can
9 give your their position. On Rule 65 you can do it on notice,
10 you can impose your desire that way so the parties know they
11 have to complete their best possible record in the time
12 allotted so it is not so much a do they want it if you think it
13 makes sense. Everyone will have a clearer picture of whether
14 it makes sense once we get going on discovery.

15 THE COURT: Mr. Englander?

16 MR. ENGLANDER: Your Honor, that is fine. We are fine
17 with the schedule. There are a couple of housekeeping issues
18 associated.

19 Mr. Keller has represented the reason we are fine with
20 the schedule, Mr. Keller represented he is going to provide us
21 a brief that indicates, lays out those parts of his case that
22 he can lay out.

23 THE COURT: Yes.

24 MR. ENGLANDER: Frankly, based on what we are hearing
25 now, we are going to endeavor to file a motion for summary

C3DJABCM

Motions

1 judgment far enough in advance to have that brief for you on
2 that same schedule. We can sit down and try to figure out a
3 briefing schedule, and I think there is a fair chance we'll be
4 able to do it. Is that what you want to prefer or are we going
5 to try to hash that out while we are here?

6 THE COURT: We can hash out some of it and you can --
7 for my purposes, I would like a set of preliminary briefs on as
8 much pre-fact or in the world of facts as you have it now that
9 can be done. Maybe that will -- and not only will help me, but
10 then the target is clear. So let's at least set a schedule for
11 that.

12 MR. KELLER: Next week?

13 THE COURT: My only hesitation is I don't yet know
14 whether the cases are consolidated. I think I should be able
15 to -- I am hopeful I'll hear from Judge Marrero today or
16 tomorrow and see where he is. A week from today would be
17 great.

18 MR. KELLER: Okay. My question is: Does it assist
19 the court if those briefs, the initial briefs, come in, even
20 though it is a little unusual, not in the form of a moving
21 brief, but a Bench memo for the court simultaneously submitted,
22 and simultaneously each side responds to the other brief
23 because that will save some time.

24 THE COURT: No.

25 MR. KELLER: I am just asking.

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Motions

1 THE COURT: Part of the work being done here is just
2 setting the target of your PI motion.

3 MR. KELLER: Okay.

4 THE COURT: I don't think they should be asked to
5 simultaneously brief.

6 MR. KELLER: We'll submit a brief a week from today.
7 Then what would be the rest of the schedule thereafter?

8 THE COURT: Do you want to work it out or do you want
9 me to sort it out?

10 MR. KELLER: A week from today is what you ruled on
11 our brief. Tell us where you are.

12 THE COURT: Mr. Englander, Mr. Keller has volunteered
13 a week from today for his. What would you like?

14 MR. ENGLANDER: This is not an opposition brief, but
15 more in the nature of responsive to his brief what our position
16 is?

17 THE COURT: Well, yes, call it what you like. It will
18 be responsive to his brief. You'll have the opportunity,
19 you'll both obviously have opportunity to do your briefing in
20 advance of the hearing following discovery.

21 MR. ENGLANDER: We anticipate also filing a motion for
22 summary judgment. Giving him enough time to respond will
23 probably be more of a -- let me confer with Mr. Hosp to make
24 sure I am not committing to something.

25 THE COURT: While you're doing that, while you're

C3DJABCM

Motions

1 doing that, we'll pick our date. Why don't I reserve for the
2 hearing, I've got other matters on Fridays, so I am looking at
3 for the hearing itself May 29th, 30th and 31st.

4 MR. ENGLANDER: If you set it either Wednesday or
5 Thursday, it seems to me that will give us an opportunity to
6 come back from the weekend.

7 THE COURT: It has to be done in two days.

8 MR. KELLER: I think that can be done in two days,
9 your Honor.

10 THE COURT: We'll take the 30th and 31st.

11 MR. ENGLANDER: That sounds right. If I get the dates
12 right, you're saying you will have your brief in somewhere
13 around the 21st or thereabouts, right?

14 How about if we file a responsive brief to Mr.
15 Keller's brief mid-April and also file any motion for summary
16 judgment we are going to file at that time?

17 MR. KELLER: Your Honor, again they can move at any
18 time, but I want to be clear what I said earlier.

19 THE COURT: Right.

20 MR. KELLER: If they move for summary judgment before
21 there has been any discovery, what do you think our opposition
22 is going to be based on?

23 We can't say whether there is any disputed facts until
24 an evidentiary discovery record has been created. I know that
25 they like the concept of summary judgment, but I want to be

C3DJABCM

Motions

1 clear, if they do it at the very outset of the expedited
2 discovery period --

3 THE COURT: You said --

4 MR. ENGLANDER: Their opposition wouldn't need to be
5 due until mid-May, at which point all fact discovery should be
6 in and they should have the opportunity to respond on a full
7 factual record.

8 MR. FABRIZIO: Maybe I missed something. What are you
9 proposing for mid-April, the response to what we file next
10 week?

11 THE COURT: He suggested consolidating for his
12 purposes.

13 MR. ENGLANDER: I think we'll file them separately if
14 it is okay?

15 THE COURT: Well, let's keep them distinct. Let's set
16 a time-frame for the preliminary sets of briefs. If you don't
17 want to file it, you don't have to file it. It is up to you.

18 I think it is right you say you can bring your summary
19 judgment motion whenever you like, but knowing that we need to
20 be looking at towards the close of discovery in order for Mr.
21 Keller to be able to respond, and I trust that he will if we
22 are done with that, we can move forward and do this all at
23 once. If we can't, we can't, but we are going to try to do
24 that. It is my hope if it is feasible given what you have all
25 learned in the course of discovery.

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Motions

1 You're free to bring your motion whenever you like.
2 If you would like to respond as a preliminary matter, tell me
3 when you would like to.

4 MR. ENGLANDER: I would say mid-April would be time
5 for a responsive brief.

6 THE COURT: You have a concern with that?

7 MR. KELLER: I am just trying to --

8 MR. FABRIZIO: -- I don't have a concern with that,
9 but I would make a counter-suggestion.

10 THE COURT: Hang on a second. We have a court
11 reporter and two people talking.

12 MR. FABRIZIO: Sorry. I have a counter-consideration.
13 I have no problem with their filing their response in
14 mid-April. My suggestion would be we file our brief not a week
15 from today, but a week from Friday, so it is the end of next
16 week.

17 THE COURT: You are not in front of me yet. I can't
18 tell you when to file a brief.

19 MR. KELLER: I have to tell you something. I do have
20 a problem with a mid-April response to what we are filing only
21 because we're now being asked to put in a brief in a week,
22 which I represented we would do, but then as I count the
23 calendar weeks, that gives them one, two, three weeks at a
24 minimum to put in something on their own. That seems a
25 little --

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Motions

1 THE COURT: Isn't it just to their disadvantage to
2 have your side of the matter sitting in front of me?

3 MR. KELLER: That depends on things that I don't know
4 about as to how Chambers works. If you are going to read it
5 right away and study it intently every day, perhaps. I am
6 thinking it does give them an inordinate advantage in terms of
7 time because they will be taking discovery as we are going
8 through this process -- look, I think it is equitable.

9 I understood the desire of the court to have
10 preliminary briefing from people who obviously know the case
11 law, so you can get the law lay of the land, as the lawyers see
12 it. We'll put in our brief next week on any day you order. We
13 are happy to do it a week from today and we will.

14 They should not have three more weeks to respond.
15 That doesn't seem quite fair to me. It should be a shorter
16 period and they shouldn't be able to work in any of the facts
17 that might be adduced in the course of discovery that will be
18 ongoing.

19 THE COURT: I didn't understand that latter part, what
20 Mr. Englander was asking.

21 MR. KELLER: I don't think -- I am expressing concerns
22 what I perceive to be a relative unfairness. That said, my
23 position is stated. So any way you like it!

24 MR. HOSP: At the risk of seeming agreeable --

25 THE COURT: By all means!

C3DJABCM

Motions

1 MR. HOSP: -- I think, Mr. Keller, with the parameters
2 that your Honor has laid out in terms of Mr. Keller's initial
3 brief and the ultimate date for the hearing, I think if we all
4 sit down, we can actually hammer out this schedule, but it
5 probably makes more sense to do that with everybody's calendars
6 out and actually looking and having the opportunity to talk
7 through this specifically.

8 THE COURT: That is fine with me. My view on this
9 point, Mr. Keller, is that as the movant, you're seeking the PI
10 in the time-frame that you are, I think for my purposes what I
11 want is an opening brief on the law that narrows the issues.
12 It seems to me it is to their disadvantage to take longer than
13 they need to respond to that, but they don't have to respond to
14 it at the end of the day.

15 I agree what it can't, what it can't do is sort of
16 incorporate factual information because that just means that
17 you're going to come and say we need an opportunity to respond
18 to that, and then I'll have eight briefs before we get to the
19 actual briefing.

20 MR. KELLER: Understood.

21 MR. ENGLANDER: Your Honor, with one issue that is
22 significant. I understood that Mr. Keller in his initial brief
23 would also lay out what their irreparable harm case is so that
24 we have an adequate opportunity to respond to that before the
25 close of discovery and the hearing. That was part of the

C3DJABCM

Motions

1 reason why the expedited schedule made sense. I think that
2 will have some facts baked into it. They're all within the
3 control of plaintiff.

4 MR. KELLER: Your Honor, let me make it easy. Our
5 irreparable harm is exactly the irreparable harm that the
6 broadcasters suffered in the IVI case and --

7 THE COURT: This initial briefing can include your --

8 MR. KELLER: There are no secrets. The irreparable
9 harm will be exactly as the same type of harm that Judge
10 Buchwald found to be irreparable in the IVI and that led her to
11 issue a temporary restraining order in the Film On case.

12 THE COURT: You will want to make that argument to me
13 and not ask me to reference --

14 MR. KELLER: There will be specific facts that we will
15 talk about as we put on our preliminary injunction evidence on
16 the schedule that you've already just ordered, but for the
17 purposes of the preliminary brief I am telling them now what it
18 is. It is not a secret. They know it already.

19 We are going to have -- I see a fight looming, and I
20 will try to resolve it.

21 THE COURT: I would rather resolve it now.

22 MR. KELLER: We are not going to give them all of our
23 various retransmission agreements because they weren't ordered
24 to be given given up in the IVI case. They are extremely
25 confidential and it is the fact of the agreement and not

C3DJABCM

Motions

1 specific details that creates the irreparable harm.

2 Whether we got paid 10 cents or \$10,000 isn't the
3 issue. The loss of control over the distribution of our
4 copyrighted programming is the irreparable harm that we will be
5 relying on. Just as Judge Buchwald ruled, we don't need to
6 give them the various agreements that we have with cable
7 operators and multisystem operators and satellite operators.

8 Those agreements, they exist. We can tell them that
9 they exist. We can identify their existence, so we can swear
10 to their existence on a stack of Bibles. We know they exist.
11 You can take judicial notice our copyrighted programming is
12 retransmitted across the United States in a variety of ways by
13 people who either qualify for compulsory licenses or take the
14 time to negotiate their own licenses. They're doing neither.

15 That is irreparable harm. The loss of control over
16 copyrighted content is well recognized as irreparable harm and
17 we will put on the facts that we will lose control and the
18 reasons why, but we will not willingly, and if we have to brief
19 this, too, we will, although I would like to avoid it because
20 it is not the first time the issue has been litigated. We will
21 put in a lot of details why that is not something they get to
22 have in discovery. The irreparable harm case is absolutely
23 clear. It is ruled on. It is the same case as IVI.

24 THE COURT: Mr. Englander, am I correct that to assume
25 you intend to argue you are entitled to the retransmission

C3DJABCM

Motions

1 agreements?

2 MR. ENGLANDER: Yes, but we are not prepared to argue
3 that in the brief. They're the moving plaintiff claiming
4 irreparable harm. This will be relevant discovery, it seems to
5 me. We would like the opportunity to brief it. We know it
6 will be an issue, so we will try to get it resolved as quickly
7 as we can.

8 MR. FABRIZIO: In answer to your question, I think the
9 brief that we will file, assuming both two briefs, I don't
10 think we intend to submit evidence, actually affidavits for
11 irreparable harm, but I see no reason why we would not identify
12 the categories of harm and the legal underpinning or our
13 irreparable harm case.

14 MR. KELLER: I absolutely agree. That is what I meant
15 to say. If I didn't make it clear, I apologize.

16 MR. HOSP: As you indicated before, there is an
17 indirect infringement claim here. I want to be clear there is
18 overlap between the notion of irreparable harm with respect to
19 injunctive relief and preliminary injunction and the fourth
20 factor of the fair use test to the extent that there is a claim
21 for indirect infringement with respect to potential value of
22 the programming.

23 Is the same argument going to be limited to the extent
24 that we get into a fair use defense?

25 MR. FABRIZIO: Honestly, I don't know what you just

C3DJABCM

Motions

1 meant.

2 THE COURT: I didn't understand the point. I don't
3 think I need to. Here is what we are going to do. I set the
4 hearing date. I want an initial set of briefing. I am going
5 to set dates, so by the 21st for the movant and -- I despise
6 this calendar -- April 4th in response.

7 I'd like a joint letter on the remaining -- actually,
8 let's just do it. We're talking closing discovery for the
9 PI -- well, I propose April 17th, which is five weeks.
10 Actually, hang on. We moved it back. The close of discovery
11 by April 24th.

12 MR. HOSP: Is that inclusive of expert discovery?

13 THE COURT: It is. Mr. Keller, you intend to submit
14 briefing on that date, you said?

15 MR. KELLER: Sure, yes, if you would like, in addition
16 to the brief that we are already going to give you, additional
17 briefing in advance of the preliminary injunction hearing, we
18 will do that. It is going to be somewhat, it is going to be a
19 little duplicative because the legal arguments wouldn't have
20 changed very much, but it will certainly have the benefit of
21 specific factual points we intend to produce at the hearing.

22 THE COURT: I would like from each side briefing in
23 advance of the hearing once we hit the close of discovery.

24 MR. FABRIZIO: Your Honor, would it be possible for
25 the parties to work out the schedule for that briefing?

C3DJABCM

Motions

1 THE COURT: I don't know.

2 MR. FABRIZIO: I believe it would be. I believe
3 Mr. Hosp was making the same suggestion. That way we can --

4 THE COURT: I am comfortable with that. I am
5 comfortable with that. So you have got the hearing date now,
6 you have the close of discovery including expert discovery, you
7 have got dates on initial briefing pre-discovery. I am happy
8 for you to work out otherwise between yourselves and submit a
9 joint letter to me with briefing in advance of the hearing
10 itself.

11 MR. FABRIZIO: I think we need just one more thing
12 from your Honor. How far in advance of the hearing date would
13 you like to see the last brief filed?

14 THE COURT: Well, I hope for one of my other trials
15 settling in May. I need to have it, I would like to have it by
16 the 14th. That is giving me two weeks.

17 MR. FABRIZIO: So it shall be!

18 THE COURT: Anyone concerned about that?

19 MR. ENGLANDER: It seems a little tight if we are
20 contemplating replies. The first brief is April 24th?

21 THE COURT: We can do it without replies. I guess it
22 depends in part whether you're moving for summary judgment.

23 MR. ENGLANDER: We can come very close to that date.

24 THE COURT: Okay. With that, why don't you work out
25 the specific --

C3DJABCM

Motions

1 MR. KELLER: We'll see if we can work it out and
2 report back. I have one more question.

3 THE COURT: Let me just set, so we have got -- why
4 don't you all submit a joint letter to me by this Friday, and
5 then in response to that I'll -- assuming everything is agreed
6 upon and I agree to it -- I'll put out an order memorializing
7 the schedule.

8 MR. FABRIZIO: Hopefully we will be officially yours
9 before then. If not, you will be able to assume we agree with
10 whatever Mr. Keller said sight unseen, how about that?

11 MR. KELLER: I wish life were like that.

12 Your Honor, did you, after hearing all of this, come
13 closer to a decision whether you would like direct by
14 declaration and cross only for --

15 THE COURT: I would like live direct.

16 MR. KELLER: Okay.

17 THE COURT: Mr. Englander, you were standing?

18 MR. ENGLANDER: No, your Honor.

19 THE COURT: All right. So you'll submit to me by
20 Friday a certifiable proposal that works within the boundaries
21 I have set. I imagine I'll be hear from you in-between at
22 least on one discovery dispute unless you can work it out. I
23 do strongly encourage if there are others that you try to work
24 them out, but call us if you need us.

25 MR. ENGLANDER: Sorry, but I need a little

C3DJABCM

Motions

1 clarification because I am a little behind.

2 As far as the hearing goes, I am coming to understand
3 anyone who submits an affidavit should be available to give
4 live direct, is that it?

5 THE COURT: My rules had anticipated for Bench trials
6 and generally PIs that I was going to do affidavits for direct
7 testimony and just cross-examination. I am actually going to
8 change those rules, so I will effectuate that change now and,
9 in any event, I would want it hear.

10 MR. ENGLANDER: If there is no limit, then --

11 THE COURT: We'll meet and do a final, a conference in
12 advance of the hearing to make sure that we have an agreed upon
13 basic schedule, and I know from looking at -- if you're going
14 to file for summary judgment, you submit whatever affidavits.

15 MR. ENGLANDER: All I am trying to get a handle on is
16 the scope of this preliminary injunction hearing in terms of
17 who is actually going to testify as opposed to information that
18 is supplied by affidavit.

19 Again I think you're right, we can probably talk about
20 this. My sense is probably there are some witnesses that the
21 parties will want to put in front of you. There may be other
22 stuff that an affidavit is enough.

23 THE COURT: Of course, of course. Only put live
24 witnesses in front of me that I am going to need. You can put
25 in affidavits of folks who will be live witnesses, I'll read it

C3DJABCM

Motions

1 all. I agree, I hope you'll come to agreement on a basic
2 schedule for the hearing and scope of it. It is two days,
3 everyone. You look perplexed, Mr. Keller.

4 MR. KELLER: I was thinking, your Honor -- and I am
5 sorry that it showed -- would it not ordinarily be the case in
6 duplicate --

7 THE COURT: He may file for summary judgment.

8 MR. KELLER: That is his choice. The point is with
9 your ruling that you want live witnesses, I am thinking there
10 won't be too many people that we will have affidavits from as
11 part of our preliminary injunction case, and I was just
12 thinking through how that fit with what was being said.

13 My view of it is, and then I was thinking even more,
14 and that is what you saw, about whether it makes sense in this
15 case to have some sort of schedule beyond two days, whether
16 there should be X hours put aside or something like that. That
17 is something we'll talk about.

18 THE COURT: Why don't you talk about it, try to sort
19 it out, and if you can't, then we can do a phone conference and
20 I'll set the ground rules.

21 MR. KELLER: Understood.

22 THE COURT: You look perplexed!

23 MR. ENGLANDER: I am because now I am thinking sort of
24 one way to do this, obviously, is the affidavits and the full
25 basis for their motion for preliminary injunction are before

C3DJABCM

Motions

1 you before the hearing takes place. We have had a full
2 opportunity to respond to what we think the facts are before
3 the hearing takes place.

4 Live witnesses come on because you may have technology
5 that needs to be explained. If we do it the other way and we
6 don't have all the evidence in until at the hearing, then we
7 are going to have post-hearing briefing. I was just sort of
8 going through that in my head. Again that is your Honor's --

9 THE COURT: Why don't you all see what you want to
10 propose to wrap this all up, and I'll take a look and let you
11 know if I agree or disagree. If you can't agree, I'll tell you
12 what the grounds rules are.

13 MR. KELLER: That makes sense. Thank you, your Honor.

14 THE COURT: Is there anything further before -- you
15 have now set the record. This is my longest scheduling
16 conference to date. I haven't been at this very long.

17 MR. FABRIZIO: You scheduled a preliminary injunction
18 and summary judgment motion?

19 THE COURT: Potentially.

20 MR. FABRIZIO: Maybe.

21 MR. KELLER: Thank you for seeing us on such short
22 notice.

23 THE COURT: Is there anything else, Mr. Keller?

24 MR. KELLER: No.

25 THE COURT: Mr. Englander and Hosp?

C3DJABCM

Motions

MR. HOSP: Thank your Honor.

MR. ENGLANDER: No.

MR. FABRIZIO: Thank your Honor.

THE COURT: Very well. I'll be hearing from you soon.

(Court adjourned)